IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9559 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HAJIMAHMAD JAN-MAHMAD SHAIKH

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

RULE SERVED BY DS for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 15/02/2000

ORAL JUDGEMENT

Heard the Learned Advocate Ms.D.R.Kachhavah for the petitioner and Learned AGP Mr.K.T.Dave for respondent No.1,2 & 3. The detention order dated 18.5.99 passed by the respondent No.1, Commissioner of Police, Ahmedabad against the petitioner in exercise of the powers conferred under Section 3 (1) of Gujarat Prevention of Anti Social Activities Act , 1985 ("PASA" for short) is

challenged in the present proceedings under Article 226 of the Constitution.

2. The grounds of detention served and supplied to the petitioner under Section 9(1) of PASA, copy of which is produced at Annexure B interalia indicate that six prohibition cases are registered against the petitioner at different police station in between 24.5.1998 to 23.3.1999. That in each case country made liquor has been seized. That 4 cases out of said six cases are pending for Trial in the Court while 2 cases bearing CR No. 280 of 1999 and 292 of 1999 dated 20.3.99 and 23.3.99 respectively are pending for further investigation.

3. The grounds also indicate that 2 witnesses on assurance of their anonymity have given information regarding boot-legging activity of the petitioner vide their statements dated 17.5.99. One of the witness has narrated the incident of 20.4.99 while other witness has narrated the incident dated 27.4.99. That on the basis of the said material, the respondent no.1 as Detaining Authority has come to the conclusion that the petitioner is a boot legger within the meaning of Section 2 (b) of PASA. That enforcement of general provisions of law not being sufficient to prevent the petitioner from continuing his anti-social activities. The Detention order is necessary to prevent the petitioner from continuing his boot-legging activity and as such the impugned order is passed.

4. The petitioner has challenged the impugned order on numerous grounds. It is contended at Bar on behalf of the petitioner that on the date of passing the impugned order i.e. 18.5.1999, the petitioner was in judicial custody in respect to CR No. 280/99 and CR No.292/99. That thereby the impugned order is invalid on account of non-application of mind. The petitioner has also taken a contention that the Detaining Authority has failed to consider the aspect of cancellation of bail granted to the petitioner as available under Section 437(5) of the CR.PC. It is also submitted that the petitioner has made representation dated 19.11.1999. However, the same has not been considered.

5. Ld. AGP Mr.K.T.Dave has elaborately objected the first contention urged on behalf of the petitioner and has submitted that the fact that the petitioner was in judicial custody on the date of passing of impugned order cannot invalidate the detention order as the same is based on subjective satisfaction reached by the Detaining

Authority on the basis of the facts placed before him. That as elaborated in the grounds of detention, the petitioner was arrested on 24.5.98 in respect to CR No.186/98 registered at Nasabandi (E) Police Station and was released on bail on 25.5.98. Soon after the petitioner was again found to be indulging into boot legging activity and on 1.9.1998 he was arrested in CR No.325/98. That the petitioner was released in the said case on 2.9.99. Again the petitioner started indulging into boot legging activity and was arrested in respect to CR No. 5059/98 on 11.10.1998. That the petitioner was released on bail in the said case on 12.10.98. That despite the said fact, the petitioner continued to indulge into bootlegging activities and was arrested on 4.11.98 in respect to CR No. 565/98. That even after 22.2.99 two prohibition cases are registered against the petitioner at Nasabandi Police Station on 20.3.1999 vide CR No.280/99 and 23.3.1999 vide CR No. 292 of 1999. In both the cases the petitioner was found to be a accomplice in respect to possession of illicit liquor. That the petitioner could not be traced till 16.5.99 as he was avoiding the arrest. That since 16.5.99, he has remained in judicial custody. Thus, the past activity of the petitioner to the judicial custody in proximate time suggests that the petitioner has propensity in indulging into prejudicial activity of bootlegging irrespective of registration of criminal cases against him and prosecution of the same. That thereby it cannot be said that the Detaining Authority has not applied his mind especially to the fact that in a prohibition case person would remain in custody for a short period and immediately after release the person like petitioner having antecedant history of indulging into boot legging activity is likely to continue to indulge in such activities and as such the contention cannot be accepted. To support the submission Mr.Dave has referred to & relied on the observations made by the Supreme Court in the matter of Sanjeevkumar Agrawal Vs. Union of India reported vide AIR 1990 SC 1202.

6. That as regards passing of detention order against a person who is already in custody the Constitution Bench of Supreme Court in the matter of Rameshwarshaw Vs. District Magistrate, Burdwan reported vide AIR 1964 SC Page 334 has observed in para 9 that:-

> "In deciding the question as to whether it is necessary to detain a person the Authority has to be satisfied that if the said person is not detained he may act in a prejudicial manner and this conclusion can be reasonably reached by the

Authority generally in the light of evidence about the past prejudicial activities of the said person."

The Court further observed in Para 10 as under:-

"But the past conduct or antecedant history of the person on which the Authority purports to act should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary."

7. That in the matter of Sanjeevkumar (Supra), the Supreme Court followed the proposition stated by the Constitution Bench in the above stated mater of Rameshwarshaw (Supra) and has made the following observation in Para 11 as under:-

"11. It could not be said that no order of detention can validly be passed against a person in custody under any circumstances. Therefore the facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention passed in the case of a detenu who is already in jail. In the instant case the detaining authority was not only aware that the detenu was in jail but also noted the circumstances on the basis of which he was satisfied that the detenu was likely to come out on bail and continue to engage himself in the smuggling of goods. Therefore the detention was not ordered on the mere ground that he is likely to be released on bail but on the ground that the detaining authority was satisfied that the detenu was likely to indulge in the same activities if released on bail. Therefore the detention order could not be quashed merely on the ground that the detenu was in jail."

8. In the instant case, as pointed out by Ld. AGP from the ground of detention that the petitioner/detenu has been continuously indulging into prejudicial activity as boot legger since 25.4.1998 to 16.5.1999 i.e. day on which he was arrested and sent to judicial custody. That in between the said period 4 cases for the offence

punishable under Prohibition Act are filed against the petitioner and in each of the case the petitioner was arrested and released on bail. Immediately after the release, the petitioner continued to indulge into boot legging activity. In view of the said facts and circumstances placed before the Detaining Authority it is difficult to uphold the submission urged on behalf of the petitioner that passing of detention order when the detenu is in judicial custody suggests non application of mind.

9. The other contention raised on behalf of the petitioner that the consideration of the representation dated 19.11.99 was delayed. That the Learned Advocate for the petitioner could not substantiate the ground which is taken in Para 8 of the petitioner where it is only stated that if it is delayed for consideration the valuable right under Article 22(5) of the Constitution is violated. However, no facts are pleaded in the pleadings that the said representation was not considered or considered with inordinate delay in violation of Article 22(5) of the Constitution. In view of such a defective pleadings though there is no counter affidavit filed on behalf of the respondent the contention cannot be of any assistance to the petitioner.

10. The third contention urged on behalf of the petitioner that the impugned order suffers from the infirmity of non-application of mind in as much as Detaining Authority has not considered the aspect of less drastic remedy like claiming cancellation of bail under Section 437(5) of the CR.PC.

11. It is true that the grounds of detention do not disclose any fact whereby Detaining Authority has considered the aspect of less drastic remedy claiming cancellation of bail under Section 437(5) of the CR.PC. Ld. AGP Mr.K.T.Dave has vehemently urged that as the petitioner was in judicial custody there was no occasion for Detaining Authority to consider such an aspect of claiming cancellation of bail.

12. That in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT AND OTHERS 1995 (2) GLR 1134, the Division Bench of this Court has expressed the view that non consideration of less drastic remedy available under Section 437(5) of the CrPC claiming cancellation of bail amounts to non application of mind which vitiates the subjective satisfaction, thus rendering the detention order bad in law. That the said view has been approved and endorsed in the proceeding of Letters Patent Appeal

No. 1056 of 1999 decided on 15.9.1999 by this Court (Coram: C.K.Thakkar & A.L.Dave, JJ).

13. In view of the above stated legal proposition settled by the Division Bench of this Court and approved by the Appellate Bench it is difficult to accept the submission urged on behalf of the Learned AGP Shri K.T.Dave. The Detaining Authority has failed to consider the aspect that out of the six cases registered against the petitioner, the petitioner was released on bail in respect of 4 cases and subsequent activity of indulging into boot-legging were sufficient to claim cancellation of bail of the petitioner if the petitioner was required to be prevented from continuing his anti-social activity immediately. The said aspect having not been considered, it is required to be held that the detention order suffers from the vice of non-application of mind in as much as the authority has failed to consider the less drastic remedy like cancellation of bail granted to the petitioner in four cases pending for trail before passing the impugned order which has vitiated the subjective satisfaction and has rendered the impugned order invalid.

14. On the basis of the aforesaid discussions, the petition is allowed. The impugned order dated 18.5.99 passed by the respondent no.1 against the petitioner is hereby quashed and set aside The petitioner Hajimahmad Jan-mahmad Shaikh is ordered to be released forthwith if not required in any other case. Rule made absolute to that extent. No order as to costs.

(A.L.Dave, J)

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